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No. 788

IN THE

Supreme Court of the United States

PAUL L. TUGWELL, *Petitioner*

v.

A. F. KLAVENESS & CO., *Respondent*

PETITION FOR CERTIORARI

PETITION

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PETITION

Now Comes, PAUL L. TUGWELL, and files this his Petition for Writ of Certiorari in the above captioned matter and would respectfully show:

I.

The official report of the opinion delivered by the Fifth Circuit Court of Appeals below is to be found at 320 F. 2d 866. Such opinion is appended as provided in sub-paragraph 1 of Rule 23, Supreme Court Rules. There is no published opinion from the District Court.

II.

A. The date of the judgment sought to be reviewed is July 3, 1963.

B. The date of entry is July 3, 1963. Motion for Rehearing was overruled on the 29th day of August, 1963.

C. On the 27th day of November, 1963 the time for filing petition for writ of certiorari was extended to and including January 11, 1964 and thereafter on or about the 11th day of January 1964 the time for filing petition for writ of certiorari was extended to and including January 26, 1964.

D. Statutory provisions believed to confer jurisdiction on this Court is Rule 19 (b), Supreme Court Rules, and 28 U.S.C.A. 1951.

III.

The questions presented for review are:

A. Did the lower Court apply an improper standard under the harmless error rule in reviewing this cause by determining for itself whether the asserted errors (assumed to be erroneous) did in fact cause the jury to reach an improper verdict, or should the lower Court have determined whether or not the asserted errors (assumed to be erroneous) related to the substantial rights of petitioner and if so then held same to be prejudicial unless it affirmatively appeared from the whole record that such was not prejudicial?

B. Does the action of the Court before the jury in a jury case, in accusing a party's counsel of intending to withhold information, by the attorney's objection to the

introduction of certain evidence, with an attempt to explain the reasons for such objection, involve such a departure from the accepted and the usual course of judicial proceedings as to call for this Court's power of supervision?

IV.

The statutes which the case involves are as follows:

A. 28 U.S.C.A. 2111 and Rule 61 Federal Rules of Civil Procedure, The Harmless Error Rule.

B. 28 U.S.C.A. 1732 Commonly known as the Federal Business Records Statute.

V.

THE STATEMENT OF THE CASE

This is a petition for Certiorari to the Fifth Circuit Court of Appeals from its review of a judgment for Respondent by the United States District Court for the Southern District of Texas. Petitioner, in a diversity action, alleged and offered proof that, while working as a longshoreman on July 12, 1958, at night, for a stevedore aboard the M/S Pleasantville, owned and operated by Respondent, sustained injuries to his back by reason of the negligence of Respondent and or the unseaworthiness of its vessel when he slipped in some oil or grease on the deck of the M/S Pleasantville and fell. During the trial Respondent sought to question Petitioner about a claim he had filed with the Deputy Commissioner of Labor under the Longshoremen's and Harbor Worker's Act which did not refer to the fact that he slipped in the oil or grease upon the deck or the fact that there was defective lighting or that there was dust covering the oil or grease on the

deck but only that the injury occurred in the course and scope of his employment. Petitioner's attorney objected to this on the ground that this was not a prior inconsistent statement for the reason that all that was required under the Longshoremen's and Harbor Workers' Act was the fact that the injury occurred at the time and place within the course and scope of his employment and that the details of the same were entirely irrelevant and immaterial to the Longshoremen's and Harbor Workers' Act as neither fault nor unseaworthiness was a prerequisite for a recovery under the Longshoremen's and Harbor Workers' Act. At that point the Court, instead of sustaining or overruling the objection which Petitioner's counsel made, in the presence of the jury, accused Petitioner's counsel of intending to withhold information, saying "It is your intention to withhold information, my ruling is since the plaintiff has come to this court and filed a claim in this court that I will allow the deendant to interrogate him about it." Motion for mistrial was overruled and the jury was then instructed: . . . *"you are instructed that the court did not mean to imply that plaintiff has or is attempting to properly withhold evidence in this case . . ."* (Italics added for emphasis because this is incorrectly quoted on P. 870 of the opinion of the Fifth Circuit.) Thereafter, during the trial petitioner denied any previous injuries to his back saying that he did not remember any. Counsel or Respondent then brought forth a report of injury sustained by Appellant to his back as reported under the Longshoremen's and Harbor Workers' Act on May 28, 1957, some fourteen months prior to the time of the injury made the basis of this suit. Petitioner testified that he did not recall having sustained such injury and thereafter

upon motion of Appellant's counsel the impleaded stevedore was required to divulge to Petitioner's counsel the remaining part of the file of Texas Employers' Insurance Association, from which the report of the injury which Appellant had been questioned about had been removed, which file contained a carbon copy of the report to the Deputy Commissioner of Labor under the Longshoremen's and Harbor Workers' Act to the effect that the injury of May 28, 1957, about which Respondent had theretofore questioned Petitioner, had not resulted in any loss of time by Petitioner and that Petitioner had required no medical treatment on such occasion. Petitioner then offered to prove such record under the Federal Business Records Statute, 28 U.S.C.A. 1732, and offer same in evidence, which was refused on the ground that it was not competent evidence. Upon the close of all the evidence Petitioner moved for directd verdict in his favor which the Court overruled and submitted the case to the jury on interrogatories, the first of which interrogatories inquired as to whether or not the Petitioner sustained an injury by slipping and falling upon the deck of the M/S Pleasantville during the early morning hours of July 12, 1958, to which the jury answered "no", and under the instructions were not required to answer any further interrogatories. Judgment was entered for Respondent.

Upon appeal to the Fifth Circuit the trial Court's judgment was affirmed with the Court holding that the exclusion of the evidence offered and the accusation of Petitioner's counsel of withholding evidence was not really harmful to Petitioner and in effect did not result in the jury returning an improper verdict.

VI.

Jurisdiction was afforded the District Court by reason of diversity of citizenship with the requisite amount in controversy.

VII.

ARGUMENT AND BRIEF

A. Petitioner's cause of action was submitted to the jury for a determination of the truth of what, if anything, occurred to him. Otherwise it is fundamental that a verdict would and should have been directed against him. Since Petitioner's cause of action was supported by his testimony (as well as others) Petitioner's credibility was at issue. As this Court so aptly said in *Weiler v. United States*, 65 S. Ct. 543, P. 550, 323 U.S. 600, P. 608, "In gauging the truth of conflicting evidence, a jury has no simple foundation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity . . ."

The trial Court first improperly accused Petitioner's Counsel of trying to withhold information and then if this was not enough to destroy Petitioner's credibility before the jury then told the jury ". . . the Court did not mean to imply that plaintiff has or is attempting to properly withhold evidence . . ."

It is well recognized that the suppression of evidence affects credibility, see McCormick and Ray, "Texas Law of Evidence", Par. 328 styled "Corrupt Conduct with reference to Cause". "Any Conduct on the part of the

witness which indicates a willingness to interfere with the discovery of the truth either by . . . or suppressing true tes imony . . . may be shown to affect his credibility . . ."

And as Judge Connally of the Southern District of Texas, in an opinion involving the Union Reliance of a report finally produced—"I am of the view that it was deliberately withheld." He incidentally assigned this as a reason for disbelieving the evidence of the parties finally producing the report.

These statements coming from no less an august person than the trial judge could not have failed to adversely affect the credibility of Petitioner.

But the case on credibility does not stop here. Petitioner having denied having had any previous back trouble to his knowledge was confronted with an injury report to the same area of his back as was involved in this lawsuit which he did not recall. This could only have adversely affected his credibility. There could have been no other real purpose of introducing the report, in view of the offered report of no disability or medical attention, available to Respondent, except to attack his credibility, yet when the Petitioner sought to offer, by proper proof, the copy of the report contained in the files of adverse party under 28 U.S.C.A 1732, Federal Business Records Act, such was excluded. If such evidence had been permitted, it would have laid the foundation for the jury to have believed not only that such previous injury that Respondent made so much of before the jury was not only trivial and insignificant and that Petitioner's testimony was plausible and credible, but that Respondent was making much to do about nothing, which of itself may have had the effect of bolstering Petitioner's cause

by reason of the distortion of the severity of the reported injury.

In any event these two matters certainly bore heavily upon Petitioner's credibility, which was crucial to his cause, see *Weiler*, supra, and therefore related to his substantial rights.

The Fifth Circuit erroneously determined that these matters did cause the jury to return an improper verdict. This was not a proper standard under the Harmless Error Rule.

The proper standard and well settled rule for review of an erroneous ruling under the Harmless Error Rule as announced by this Court in *McCandless v. United States*, 56 S.Ct. 764, P. 766, 298 U.S. 342, 347, 348, is ". . . an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the record as a whole that it was not prejudicial. *United States v. River Rouge Co.*, 269 U.S. 411, 421, 46 S.Ct. 144, 70 L.Ed. 339; *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82, 39 S.Ct. 435, 63 L.Ed. 853; *Williams v. Great Southern Lumber Co.*, 277 U.S. 19, 26, 48 S.Ct. 417, 72 L.Ed. 761."

As in *McCandless*, Supra, the record in this case doesn't affirmatively show that the errors were not prejudicial. This is especially so since Petitioner's credibility was at stake and these matters each related to and affected his credibility and therefore his complete cause of action.

See also 47 Col. Law Review 450 for a review of the Harmless Error Rule, P. 462, where after reviewing the authorities including those by this court the conclusion is reached:

"If error has been committed in a jury trial, which, within the range of appreciable probability could have affected the verdict, such error will be presumed to have done so. This presumption is rebutted if upon the whole record absent the erroneous matter, no reasonable and honest jury could have returned a different verdict; i.e., in a civil case the trial court would have been justified in directing a verdict for respondent. If, however, the errors were such as to deprive the complaining party of a fair trial by an impartial jury, a new trial should be ordered regardless of the quantum of evidence."

And see also footnote No. 38 on P. 455, same article, ". . . For a jury may be considered more likely to be influenced by the judge's erroneous expressions, and if evidence which might have affected the verdict never reached the jury, the possibility of an effect on the verdict becomes more real. . . ."

So upon analysis, instead of the lower court having applied the Harmless Error Rule, as laid down by this court in past cases, it determined the case on whether or not the evidence supported the verdict. For the moment, assuming that it does, the use of this standard in determining the case ignores the fundamental concept that all parties are entitled to a fair and impartial trial before a fair and impartial jury and Court.

Petitioner by reason of the exclusion of evidence, properly admissible, see *United States of America v. New York Foreign Trade Zone Operators*, 2nd Cir., 304 F.2d 793, where the failure to admit a similar instrument was held to be reversible, which was assumed to be admissible by the lower Court, herein, coupled with an unwarranted attack

by the Court upon Petitioner's credibility has been deprived of a fair and impartial trial.

B. Because of the conduct of the court as set forth in the foregoing, this Court should exercise its power of supervision in this case by granting this petition for certiorari and reversing and remanding for new trial. While Petitioner would benefit from this course of action, it is felt by his counsel who tried the case, that the image of the courts in action in the mind of the Petitioner and his circle of friends which of necessity must extend out like the ripples in a pond caused by a stone thrown into it, could only have deteriorated and what fair minded person could really blame him or his friends for so thinking if this judgment be allowed to stand under the circumstances by which it was reached. We must remember that Petitioner was sitting in the witness chair when the Court made its accusation; this made its mark and impression. When Petitioner's counsel immediately advised the Court that Petitioner moved for a mistrial and the jury was taken out then upon Petitioner's motion for mistrial, based upon the Court's statement that Petitioner's counsel was trying to withhold information, counsel for Respondent then told the Court that the Court had not made such statement or accusation and the Court then denied it in the presence of the Petitioner who had heard it. However, the plain, cold, brutally frank record reflects that it did occur and further that when the jury was brought back in, they were then told by the Court that he *"did not mean to imply that plaintiff has or is attempting to properly withhold evidence . . ."* This only compounded the harm.

There was nothing Petitioner or his counsel could do under the circumstances except to proceed with the trial even though it was felt that from that moment on, there was not a ghost of a chance for Petitioner to prevail and up until that time it was thought otherwise by Petitioner's counsel.

It may be that upon a trial before a fair and impartial jury under a proper charge and without the matters complained of Petitioner would lose his suit, but even if such were definitely known, and frankly his counsel believes that he would prevail, he as a litigant in a United States Court is entitled to a fair and impartial trial by a fair jury uninfluenced by unjust and unwarranted accusations from the bench.

The Eighth Circuit in a case involving misconduct by counsel of less severity than this by the Court, in the case of *Kroger Grocery & Baking Company v. Stewart*, 164 F. 2d 841, P. 845, says:

"This Court in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in the District Court of the United States shall be so conducted that the verdict of the jury fairly may be assumed to be based upon an impartial consideration of the evidence and the applicable law."

This is all that Petitioner asks and it is felt that this Court's general power of supervision should be exercised to assure him of same.

VIII.

Appended hereto is a copy of the decision of the Fifth Circuit Court of Appeals dated July 3, 1963, marked Exhibit A.

WHEREFORE, premises considered, Petitioner prays the Petition for Certiorari be granted; that he be granted a hearing herein and upon final hearing an order issued to the lower Court setting aside the judgment heretofore entered, that the Cause be reversed and ordered that all costs and disbursements herein be adjudicated against Respondent and such other orders as this Court shall deem wise.

H. A. Combs

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon Honorable Miles Bradford, Baker, Botts, Shepherd & Coates, attorneys for Respondent, A. F. Klaveness & Company, by mailing same to him first class mail, postage prepaid, properly addressed to him at his office address on this 25th day of January, 1964.

H. A. Combs

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 20,278

PAUL L. TUGWELL, *Appellant*,

versus

A. F. KLAVENESS & COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court for the Southern District of Texas

---

(July 3, 1963)

Before HUTCHESON, Circuit Judge, LUMBARD, Chief Judge*, and BROWN, Circuit Judge.

BROWN, Circuit Judge: After a four-day jury trial in which nine live swearers were heard on a record comprising over 480 pages of testimony, the jury in response to a

*Of the Second Circuit, sitting by designation.

special interrogatory[1] under F. R. Civ. P. 49[2] which went to the very vitals of the case, found that the longshoreman-plaintiff had not sustained the accidental injury on July 12, 1958, which was the subject matter of his third party suit against the shipowner based upon negligence-unseaworthy theories running the gamut from *Sieracki* to *Yaka*.[3] The unsuccessful plaintiff recognizing the adequacy of the record to support the finding that the accident did not oc-

---

[1] Interrogatory No. 1:

Did plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S Pleasantville during the early morning hours of July 12, 1958?

You will answer 'Yes' or 'No'.

Answer: No.

[2] This case illustrates again the utility so often extolled by us of the use of a general charge with special interrogatories under F.R. Civ. P. 49. See Duke v. Sun Oil Co., 5 Cir., 1963, F. 2d , n. 19 [#19,975, June , 1963]; Nesmith v. Alford, 5 Cir., 1963, F. 2d , n. 30 [#19,609 May 30, 1963]; Smooth v. State Farm Mutual Auto Ins. Co., 5 Cir., 1962, 299 F. 2d 525, 533, n. 18; Travelers Ins. Co. v. Busy Electric, 5 Cir., 1961, 294 F. 2d 139, 149; Vickers v. Tumey, 5 Cir., 1961, 290 F. 2d 426, 1961 AMC 1173, notes 4 and 9; Warren Petroleum Co. v. Thomasson, 5 Cir., 1959, 268 F. 2d 5, 9, n. 3; Clegg v. Hardware Mutual Casualty Co., 5 Cir., 1959, 264 F. 2d 152; Fall v. Esso Standard Oil Co., 5 Cir., 1961, 297 F. 2d 411, 1962 AMC 951, n. 7, cert. denied, 371 U.S. 814, 83 S. Ct. 24, 9 L. Ed. 2d 55; Davis v. Parkhill-Goodloe Co., 5 Cir., 1962, 302 F. 2d 489, n. 6; Shaw Warehouse Co. v. Southern Ry., 5 Cir., 1961, 288 F. 2d 759, on rehearing, 294 F. 2d 851, 853, at 854 (dissenting opinion).

The inscrutable mystery of a general verdict for the defendant under a general charge would have left an impenetrable uncertainty as to whether these evidentiary rulings might have infected, say, the dollar evaluation of damages or the medical extent of any such injury. Here the jury positively held the occurrence did not take place.

[3] Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 AMC 698; Reed v. S.S. Yaka, 1963, — U.S. —, — S. Ct. —, — L. Ed. 2d — [31 LW 4528]

cur, seeks a reversal because of two procedural rulings each related to the receipt of evidence.

The difficulties of that attack are formidable. These bear emphasis at the outset since the problem is not the simple one of identifying the two incidents and then under microscopic examination ascertain whether in one way or another the rulings lack perfection. Under command of F.R. Civ. P. 61 and 28 USCA §2111, ours is a more substantial function which epitomizes the very nature of adjudication. We must determine whether, assuming the action under review to have been erroneous, was it really harmful to the complaining party? *Degelos v. Fidelity & Casualty Co.*, 5 Cir., 1963, 313 F. 2d 809, 814; *Ahlstedt v. United States*, 5 Cir., 1963, 315 F. 2d 62, 66.

The first error complained of was the exclusion of a copy of a report filed with the Deputy Commissioner[1] by the insurance carrier of the stevedoring company who was plaintiff's employer. This form[2] did not relate to the occurrence of July 12, 1958, the subject of the suit. Rather, it related to an alleged injury of May 28, 1957. Although it is not easy to follow the Plaintiff's theory of harmful error, apparently he contends that this negative report from a disinterested source would corroborate the Plaintiff and hence shore up his general credibility which the specific

[1] Under the Longshoremen and Harbor Workers Compensation Act, 33 USCA §901 et seq

[2] This was Plaintiff's Exhibit 8 on Form 7107. This is described as "Employer's supplementary report of accident or occupational disease." After identification of employer, employee, the date of the accident, the form reflected

"No. 5 Date disability began None

"No. 6 On what date did injured person return to work? No medical treatment

jury verdict indicates was pretty well undermined. This would result, he contends, from these very unusual circumstances. The Plaintiff had repeatedly testified on direct and cross examination that never before had he sustained a back injury. On cross examination the Shipowner, presumably armed with some data from reports filed by the insurance carrier, confronted him with the earlier 1957 occurrence. To this he answered in effect that if it occurred, he had no recollection of it. On this he then constructs the argument that since the exhibits showed that there was no disability and no medical treatment afforded for the 1957 incident, this would demonstrate that he was honest in testifying that (a) he had sustained no prior injury and (b) the event was so trivial that it could have escaped his recollection, and hence given an honest ring to his denials "so far as I can remember."

Without much critical regard to the Business Records Statute, 28 USCA §1732, which as to records made in the regular course of business and properly authenticated makes it generally unnecessary to produce as live swearers each of the persons having direct knowledge of the events or facts revealed, the Shipowner by intuitive reflex objected to this as "hearsay" and as being "incompetent." Without intimating any views as to its technical admissibility, cf. *Missouri Pacific R. R. v. Austin*, 5 Cir., 1961, 292 F. 2d 415, 421, 422, we are clear that its exclusion was not a harmful error, if it was an error at all. Hardly anywhere does the inherent nature of an adversary trial commit so much to the careful, but wide and flexible, discretion of the Judge. See *Reagan v. Sinclair Refining Co.*, 5 Cir., 1963, ____ F. 2d ____ [No. 20,165].

The second complaint oddly enough relates to the use of another form required under the Longshoremen's Act as between the stevedoring company, the employer, and the injured employee. During cross examination of the Plaintiff, the Shipowner developed that in the civil action complaint, no specific mention was made of the existence of the oft-times ubiquitous grease and other slippery substance on the deck near the cargo winch. The Shipowner then identified the official form US-203, "Employee's claim for compensation," signed by the Plaintiff Tugwell in connection with his claim for compensation growing out of the accident of July 12, 1958, the subject of the suit. Plaintiff's counsel objected to interrogation of the Plaintiff concerning this form generally on the ground that under the Longshoremen's Act, no specification of the cause of the injury is necessary, and therefore it was improper to cross examine the Plaintiff as to entries on the form since this implied to the jury that causes different from those initially reported were now asserted in the lawsuit. In immediate response to this objection, the Court then made the statement which Plaintiff now insists was a strong moral censure of the Plaintiff and his counsel.

> "The Court: The plaintiff has filed a suit in this court and he is subject to being examined about it. I will overrule the objection. He can't be asking with one hand and withholding with the other.
>
> "Plaintiff's Counsel: We don't intend to—
>
> "The Court: It is your intention to withhold information. My ruling is since the plaintiff has come to this court and filed a claim in this court

> that I will allow the defendant to interrogate him about it."

There was an immediate motion for a mistrial which was argued at length in the absence of the jury. During this colloquy, the Court disavowed any purpose to make or imply censure and requested Plaintiff's counsel to prepare a suitable instruction. Though considerable time was afforded to do this, counsel was apparently unable to complete it by the time the Court considered the trial should resume. The Judge did, however, use the incompleted draft instruction in the instructions given to the jury immediately on resuming. Of course the Judge was confronted with the paradox of the law in which, to make certain that the jury excludes some particular thing from its consideration, the Court must specifically identify that which might well have gone unnoticed when it took place. Here the Judge did that by calling the jury's attention to the fact that "an objection was made by the Plaintiff concerning the Court's earlier comments in the case wherein something * * * was said concerning that the Plaintiff would not be permitted to withhold evidence." The Court then proceeded to give this positive instruction.

> "You are instructed that the Court did not mean to imply that plaintiff has or is attempting to improperly withhold evidence in the case. My ruling is simply that defendant will be allowed to interrogate the plaintiff concerning his claims in the case."

As there was some concern on counsel's part that the Court had misunderstood his requested instruction, there

was a further conference so that the Court reiterated the instruction in a different way.

> "The Court: I will read it again. You are instructed that the Court did not mean to imply that the plaintiff has or is attempting to withhold properly admissible evidence in this case. I added the comment that the basis of my ruling is that the defendant may interrogate the plaintiff concerning his claims in the case."

Again facing this problem as a matter of substantive importance, we think the whole incident was magnified all out of proportion. The Court was not undertaking to suggest any moral criticism. As the Judge made clear in the precautionary instruction framed partly in his own, and partly in counsel's suggested words, what and all he was doing in the ruling complained of was observing in effect that the plaintiff did not think the evidence was properly admissible. It is not likely that the term "withhold" under the circumstances carried any other connotation. And in any event, this brief innocuous exchange could have had no harmful consequences. At the end of a 4-day trial in which witnesses were examined, and re-examined, cross examined, and re-cross examined until each was thoroughly swabbed of the last remote vestige of a possible relevant fact, the jury, perhaps better than anyone else, knew that the whole occurrence had been fully canvassed. Perhaps the word "withhold" was poorly chosen, but the administration of justice is something more profound than unattainable inerrancy or verbal perfection. *Maryland Casualty Co. v. Reid*, 5 Cir., 1935, 76 F. 2d 30.

After a long and hard, well fought trial, the jury, with ample intrinsic and extrinsic evidence and the opportunity to observe the witnesses close at hand, concluded that the accident never took place. That was the function of the jury, and neither of these two isolated episodes infected the result. That is the end of it.

AFFIRMED.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

The jury in this case found that the plaintiff, Paul L. Tugwell, did not sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958, as claimed in his petition.

It is hardly surprising the jury found as it did.

The plaintiff Tugwell claimed he slipped in some oil or grease on the deck of the ship between the winch control box and the hatch coaming. Tugwell testified this fall occurred within plain view of the winch operators (Tr. 97), one of which operators, Dupre, was a friend of Tugwell's (Tr. 97).

In truth and in fact, neither operator saw any such fall (Tr. 250, 287). Dupre believed he would have seen such a fall if it had occurred as claimed (Tr. 274).

There were no eye-witnesses to the alleged accident. The testimony of the plaintiff's prime witness Hambrick, locating the alleged oil and the point of falling, was specifically disavowed by Tugwell, who stated he was not even in the area designated by Hambrick (Tr. 76, 93, 94).

Tugwell reported to the timekeeper that he injured his back while tightening a guy line, making no mention of slipping in oil or grease on the deck (Tr. 420). His compensation claim, prepared in his attorney's office, and his pleadings in this case, made no reference to any oil or grease on the deck (Tr. 383, 384). Tugwell's foreman never saw any oil on the deck nor did he see anyone who had found any oil (Tr. 321, 322).

The medical evidence left a considerable question as to whether or not the plaintiff sustained any injury whatsoever. The doctor found nothing which could not be medically explained on the basis of Tugwell's pre-existing and congenital condition, absent any accident at all (Tr. 188-189). The doctor further admitted that "whether or not an injury aggravated the pre-existing condition is a basis of relating to the patient's history." (Tr. 190).

The petitioner's attorney took great pains to initially establish that the petitioner had never sustained any injury to his low back previous to this alleged accident. On at least ten different occasions, the attorney inquired of his client concerning prior back trouble (Tr. 68, 69, 70, 71, 72, 73, 74, 82). Thereafter, when the petitioner was confronted with a report of a previous low back injury approximately one year prior to the present claimed injury, the petitioner

stated he simply had no recollection of the matter (Tr. 405, 406).

Probably the clinching evidence in this case was that concerning the petitioner's earnings since the alleged accident. The petitioner filed suit claiming damages in the amount of One Hundred Fifty Thousand Dollars ($150,000), at least partially because of a claimed loss in wage earning capacity. In truth and in fact, since this accident the petitioner Tugwell has been earning approximately Fourteen Thousand Dollars ($14,000) per year, roughly twice the amount he earned prior to the alleged accident made the basis of this suit (Tr. 85 86).

Apparently the plaintiff feels that the "image of the courts in action in the mind of . . . [Tugwell] and his circle of friends . . ." which was so seriously damaged in this case, would have been greatly enhanced if the plaintiff could have recovered One Hundred Fifty Thousand Dollars ($150,000) for reduced earning capacity to go along with his Fourteeen Thousand Dollars ($14,000) a year annual salary.

In view of the above facts, it is hardly surprising the jury made the finding it did in this case. Even the petitioner does not question the evidence is ample to support the finding of the jury.

Following a four day trial and an unimpeached jury verdict, the petitioner seeks a reversal of this case because:

1. The United States Court of Appeals for the Fifth Circuit does not understand the standard by which it is to judge whether or not an assumed error is harmless, and
2. In its supervisory capacity, this Court should reverse the case as a punishment or example to the trial court

for his statement to the petitioner's attorney, which statement was not only proper and called for under the circumstances but if in any way could be construed as derogatory towards the plaintiff's attorney was promptly cured by instructions at least partially worded by the petitioner's attorney himself.

ARGUMENT AND AUTHORITIES

In his argument as to what does or should constitute prejudicial and reversible error, counsel for the petitioner misconceives both the standard and how the standard was applied in this particular case. The petitioner would place the burden of establishing no prejudice on the respondent, which is directly contrary to law.

This Court has unmistakably set out the true standard along with the burden of proof:

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court . . . He who seeks to have a judgment set aside because of an erroneous ruling *carries the burden of showing that prejudice resulted.*" (Emphasis added.)

Palmer v. *Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 482, 87 L. Ed. 645, 651.

The Court below recognized immediately that if either of the two claimed errors were in truth errors, they had not been demonstrated to have prejudiced the result in the trial court, indeed it was clear ". . . neither of these two isolated episodes infected the result."

The Court below merely paraphrased this Court in stating:

> "We must determine whether, assuming the action under review to have been erroneous, was it really harmful to the complaining party?"

In truth it is not the standard applied by the Court below the plaintiff really deplores, it was the result reached by the Court in applying that standard.

By any standard it is clear the plaintiff was not prejudiced by either of the two alleged errors. The alleged errors consisted of (1) a remark made by the Court to the plaintiff's atttorney, which remark was fully justified and appropriate in answer to the attorney's arguing with a ruling of the Court, but in any event if the remark could possibly be considered error, such was promptly cured with an appropriate instruction, and (2) the exclusion of a piece of documentary evidence which at most could only establish facts which were otherwise established and not controverted to any degree.

Probably the single most revealing contention in the plaintiff's petition for certiorari is his emphasis and reliance upon what is either a typographical error made by the court reporter or at the very most a slip of the tongue made by the trial court in giving curative instructions to the jury following the remark complained of by the plaintiff. It is significant the plaintiff has seized upon the typographical error or the slip of the tongue and triumphantly thrusts it at this Court as an example of how unfairly he has been treated in the trial court.

For the entire picture of what occurred concerning the Court's remark to counsel, it is only necessary to refer to pages 383 through 393 of the record in this case. Basically the attorney representing the plaintiff made an objection to a certain line of cross-examination, the objection was overruled whereupon the plaintiff's attorney attempted to argue and submit his own unsworn testimony as what his intention was, which improper conduct was cut-off by the simple, truthful statement of fact by the Court "It is your intention to withhold information."

As recognized by the Court below, the trial court was not undertaking to suggest any moral criticism but merely observing in effect that the plaintiff did not think the evidence should be brought to the jury's attention, i.e., that it was not properly admissible. However, to remove any possible taint or question about the matter, the Court requested the counsel for the plaintiff to prepare a curative instruction which would be given by the Court. After a considerable lapse of time, the plaintiff had only a partially worded instruction which, however, the Court accepted and made the basis of an instruction to the jury which undoubtedly cured any possible misconstruction any member of the jury might have that the Court was casting aspersions on the plaintiff's counsel.

It is here that the plaintiff claims that a remark which is clearly either a typographical error in the record or at most a slip of tongue by the Court so prejudiced the four day trial (even though immediately followed by what even the plaintiff must agree is an absolutely correct instruction) prejudice is demonstrated as a matter of law.

This position is astonishing. The Court below quoted the trial court as follows:

> "You are instructed that the Court did not mean to imply that plaintiff has or is attempting to improperly withhold evidence in the case. My ruling is simply that defendant will be allowed to interrogate the plaintiff concerning his claims in the case."

The plaintiff complains that actually the record reads ". . . or is attempting to *properly* withhold evidence . . ." rather than "improperly". That such is a typographical error is so clear the Court below did not even comment on it. Even if the statement had been made as the record indicates, it would clearly have been a slip of the tongue, otherwise what the Court was doing would make absolutely no sense at all. Particularly does the plaintiff's position in this regard seem absurd when it is recalled that the Court was attempting to follow an instruction at least partially worded by the plaintiff's attorney himself, which prepared instruction so far as this record goes may well have been exactly as is presently shown in the record.

In any event, and regardless of whether a typographical error or a slip of the tongue is involved, the matter was conclusively settled by the appropriate instruction which, is not under attack even by the plaintiff's attorney. Since the plaintiff's attorney did not however see fit to quote the second instruction in his brief, the same is here set forth:

> "The Court: I will read it again. You are instructed that the Court did not mean to imply that the plaintiff has or is attempting to withhold properly admissible evidence in this case. I added the comment that the basis of my ruling is that the defendant may interrogate the plaintiff concerning his claims in the case."

The plaintiff cites no case even remotely in point to sustain his contention the remark by the Court was prejudicial error. Indeed the remark itself was probably not error, and even if such might be error, it clearly would not be prejudicial even in the absence of curative instructions. But where as here explicit, positive instructions were given to the jury not to in any way construe the remark as the plaintiff now says he fears it might be construed, to contend prejudice resulted as a matter of law is, to put it most kindly, unsound.

Although it is difficult to tell from his petition, apparently the plaintiff has abandoned any serious complaint concerning the trial court's excluding the evidence showing the compensation carrier did not pay compensation benefits or medical benefits as a result of the plaintiff's 1957 back injury, approximately one year prior to the accident claimed to have occurred as a basis for this suit. The abandonment of such a contention would certainly appear appropriate. The plaintiff testified he lost no time from the 1957 accident, received no medical pension and made no claim of any sort. Certainly this defendant did not contest the only possible facts the document in question might tend to show, i.e., that the plaintiff had made no claim for either lost time or medical benefits as a result of the 1957 injury. It is hornbook law that the exclusion of evidence is harmless where the facts sought to be proved are otherwise proved and the evidence is merely cumulative and repetitious. See 3 *Am. Jur. Appeal & Error*, (1951, page 587.

As succinctly stated by the United States Court of Appeals for the Second Circuit in *Smith* v. *Bear* (2 Cir.) 237 F. 2d 79, at page 89:

> "Even if the memoranda were admissible as made in the regular course of business, their exclusion by the

> trial court was not prejudicial. See Rule 61, Federal Rules of Civil Procedure. The memoranda was offered as proof of the matter asserted therein. As noted above, the facts material to this controversy which were set forth in the memoranda were already in evidence in other testimony and were not disputed by defendants. We cannot see how plaintiff's cause was harmed by the exclusion of the memos."

In summary, no one has analyzed the case better than Circuit Judge Brown, when he stated:

> "After a long and hard, well fought trial, the jury, with ample int asic and extrinsic evidence and the opportunity to observe the witnesses close at hand, concluded that the accident never took place. That was the function of the jury, and neither of these two isolated episodes infected the result. That is the end of it."

It certainly should have been the end of it.

CONCLUSION

The petitioner is seeking in this Court to overturn the unanimous verdict and opinion of twelve fair minded and impartial jurors, based upon evidence submitted to them admittedly ample to sustain this verdict. Four Judges have unanimously agreed upon study of the entire record that no erro of law tainted the verdict or in any way prejudiced the rights of the plaintiff. Under these circumstances, to reverse this case in order to improve the "image of the courts in action in the mind of the petitioner and his circle of friends . . ." is hardly the purpose for which this Honorable Court exercises its discretionary jurisdiction in granting writs of certiorari.

It is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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W. C. HARVIN

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MILAS C. BRADFORD, JR.

Of Counsel:

BAKER, BOTTS, SHEPHERD & COATES

CERTIFICATE OF SERVICE

Copies of the foregoing were served upon W. A. Combs, Esquire, State National Building, Houston, Texas, and W. Jiles Roberts, Esquire, 617 Americana Building, Houston, Texas, attorneys for petitioner, by depositing same in the United States mail, postage prepaid, certified mail, properly addressed on this ..... day of February, 1964.

.....

W. C. HARVIN